

OCT 14 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

ROY E. BENNETT, by and through Virginia
L. Bennett, court appointed guardian;
VIRGINIA BENNETT,

Plaintiffs - Appellants,

v.

SCHUBERTH HELME GMBH & CO., a
corporation organized in the Federal Republic
of Germany; BAYERISCHE MOTOREN, a
corporation organized in the Federal Republic
of Germany, aka BMW AG Motorrad; BMW
OF NORTH AMERICA, INC.,

Defendants - Appellees.

No. 02-35747

D.C. No. CV-99-00035-RFC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted October 8, 2003**
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: D.W. NELSON, KOZINSKI, and McKEOWN, Circuit Judges.

Bennett appeals the grant of defendants' motion to exclude the causation testimony of Dr. Malcolm Newman and the grant of defendants' motion for summary judgment.

A ruling to exclude expert testimony under Federal Rule of Evidence 702 is reviewed for abuse of discretion even when that ruling is "dispositive of a motion for summary judgment." *Lust v. Merrell Dow Pharms.*, 89 F.3d 594, 597 (9th Cir. 1996). A grant of summary judgment is reviewed *de novo*. *Id.* at 596.

Newman admitted that he cannot identify Bennett's specific injuries, or analyze those injuries to determine the forces that caused them. The district court did not abuse its discretion when it determined that Newman cannot testify regarding causation.

The district court did, however, improperly grant defendants' motion for summary judgment on the Bennetts' product defect, failure to warn, breach of express and implied warranty, negligence and loss of support claims. Montana law permits circumstantial evidence of causation in product defect cases. *See Brandenburg v. Toyota Motor Sales*, 513 P.2d 268, 275 (Mont. 1973); *Barich v. Ottenstror*, 350 P.2d 395, 397-98 (Mont. 1976). Sufficient circumstantial

evidence exists on the record, including Newman's noncausation testimony, from which a rational jury could find that defects in the helmet caused Bennett's injuries. Each party shall bear its own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART.